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NO. 08-660

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
IRWIN EISENSTEIN

Petitioner,

v.

CITY OF NEW YORK,
MICHAEL BLOOMBERG,
JOHN DOE, JANE DOE,

Respondents.

On a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* PATRICIA HAIGHT AND IN DEFENSE OF ANIMALS IN SUPPORT OF PETITIONER

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March 2009

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INTEREST OF *AMICI CURIAE*[1]

Patricia Haight and In Defense of Animals are relators in a *qui tam* action brought pursuant to the False Claims Act (FCA), pending before the Ninth Circuit Court of Appeals, *United States ex rel. Haight et al. v. Catholic Healthcare West et al.*, Case No. 07-16857. *Amici* filed their notice of appeal 51 days after final judgment. They were following the clearly delineated Ninth Circuit rule in *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996), *cert. denied* 520 U.S. 1211 (1997), permitting any party to a *qui tam* FCA action 60 days to notice an appeal. Ten months after the appeal in *Haight* was filed, the Second Circuit created a circuit split on the issue in *United States, ex rel. Eisenstein v. City of New York,* 540 F.3d 94 (2d Cir. 2008), *cert. granted* 129 S.Ct. 988 (January 16, 2009). The Ninth Circuit stayed proceedings pending its resolution.

Amici filed their *qui tam* action involving false statements in an NIH grant application in the Northern District of California in 2001, and it was transferred to the District of Arizona, Case No. C01-02253-PHX-FJM. A prior appeal in the Ninth Circuit resulted in a significant decision under the FCA jurisdictional bar, 31 U.S.C. §3730(e)(4). *United States*

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[1]All parties have consented to the filing of this brief, and letters of consent are on file. *Amici curiae* represent that their own counsel wrote this brief and that no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

ex rel. Haight v. Catholic Healthcare West, 445 F.3d 1147 (9th Cir.), *cert. denied*, 127 S. Ct. 725 (2006). After remand, on August 14, 2007, the District Court entered judgment for defendants on cross-motions for summary judgment.

On October 4, 2007 – 51 days after entry of final judgment – Dr. Haight and In Defense of Animals noticed their appeal. At that time, counsel knew about and relied upon the Ninth Circuit rule in *Haycock*, expressly permitting any party to a *qui tam* FCA action 60 days to appeal under Rule 4(a)(1)(B) – whether or not the Department of Justice formally proceeded with the action pursuant to 31 U.S.C. §3730(b)(4).

> It does not matter much whether the unsuccessful party in a *qui tam* action has a thirty day or a sixty day deadline for filing notice of appeal. What matters a great deal is that the unsuccessful party in district court be able to figure out which time period applies, easily, without extensive research, and without uncertainty. A literal interpretation of the rule achieves this important purpose. *Haycock*, 98 F.3d at 1101.

Certiorari had been denied in *Haycock*, and by the time *amici* noticed their appeal, the 60-day rule was at least a decade old. Moreover, it had been followed by the only two subsequent circuits to consider the question. *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 308 (5th

Cir. 1999).[2] The only contrary authority was the divided Tenth Circuit opinion, prior to the 1986 FCA amendments. *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327, 1329 (10th Cir. 1978).

In addition to what seemed settled precedent, there were obvious reasons to believe the 60 day period applied. Rule 4(a)(1)(B) expressly grants 60 days to *any party* when the United States, its officer or agency is a party; and a *qui tam* action brought in the name of and on behalf of the United States readily appears to qualify. Although the government declined to proceed in *Haight*, in the district court and on appeal the government was served with all pleadings and notices of proceedings, participated in some discovery, and had the right at any time by statute to intervene for good cause. 31 U.S.C. §3730(c)(3). In the Ninth Circuit's caption, "UNITED STATES OF AMERICA, Plaintiff" and "PATRICIA HAIGHT, *ex rel* and In Defense of Animals, *et al.*, Plaintiffs-Appellants" are listed separately. And in *Haight*, 30 days from entry of final judgment, *amici*'s counsel was attending a FCA conference in Washington, D.C., meeting separately with government attorneys assigned to *Haight* to discuss the appeal.

Relators in a *qui tam* case themselves need not qualify as "the United States, its officer or agency"

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[2]Subsequent to the appeal in *Haight*, the Third Circuit joined the Fifth, Seventh and Ninth Circuit rule of 60 days. *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 300-02 (3d Cir. 2008).

under Rule 4(a)(1)(B). Although the extended period is designed to afford the government more time to protect its interests on appeal, the rule states "the notice of appeal may be filed by *any party* within 60 days" (emphasis supplied), so long as the government is a party. In *qui tam* FCA cases where the government declines to proceed under 31 U.S.C. §3730(b)(4), the government clearly retains an interest in preserving the 60-day time period for appeals. *See*, *e.g.*, *United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391 (9th Cir. 1992) (government properly intervened within the time to appeal in order to appeal a final judgment in a declined *qui tam* FCA case); *Searcy v. Phillips Electronics*, 117 F.3d 154 (5th Cir. 1997) (government has standing to take an appeal in a declined *qui tam* FCA case as a real party in interest even without formal intervention).

ARGUMENT

1. Given the Dozen Years of Circuit Rulings Granting Sixty Days to Appeal Declined *Qui Tam* FCA Actions, the Shortened Time Period Prescribed By the Second Circuit Would Create a Trap for Both the Unwary and Learned.

Principal among the reasons why the Third, Fifth, Seventh and Ninth Circuits adopted the sixty-day period is the desire to have bright-line procedural rules readily apparent to litigants and their counsel. What mattered "a great deal" to the Ninth Circuit was a holding that would enable unsuccessful litigants to "be able to figure out which time period applies, easily, without extensive research, and without uncertainty." *Haycock,* 98 F.3d at 1101. Taking Rule 1 as "a charge

to resist reading the Rules in a manner that lays traps for the unwary," the Fifth Circuit construed Rule 4(a)(1) as providing the longer time period "to reduce uncertainty in the already difficult conceptual terrain of *qui tam* suits." *Russell*, 193 F.3d at 308. *See also Rodriguez*, 552 F.3d at 302 ("Applying the shorter deadline may confuse litigants who, based on a literal reading on Rule 4(a)(1), assume that the longer deadline applies. It is especially important, when interpreting procedural rules, that we avoid any reading likely to cause confusion"); *Lu*, 368 F.3d at 775 ("These decisions also note the trap for the unwary that would be created by giving Rule 4(a)(1) a nonliteral interpretation, and the desirability of avoiding uncertain inquiries (what is the named party's real interest in the case?) to determine jurisdiction").

The shortened time period imposed by the Second Circuit in *Eisenstein* would not only confuse the "unwary," it would upend the settled expectations of those *vigilant* litigants – such as *amici* here – who relied upon years of consistent Circuit treatment, in determining when to notice the appeal. Although this Court has the mission to resolve circuit splits and lay down rules for litigants to follow going forward, this particular dispute does not come on a clean slate. Instead, twelve years after *certiorari* was denied in *Haycock*, litigants in declined *qui tam* actions have followed settled procedure in assuming they had 60 days to notice their appeal. Reliance on settled case authorities clearly entitling any party in a *qui tam* action to the longer appeal period stands among and above the many reasons – set forth by Petitioner and

discussed in the Circuit opinions – to hold the United States is a party for purposes of Rule 4(a)(1). Drawing a line now at 30 days would unfairly and inappropriately unsettle those expectations.

2. Application of the Shorter Time Period in *Eisenstein* Would Impose an Impermissible Retroactive Change in the Mandatory Procedural Rule in Those Jurisdictions Where Settled Law Permits Any Party to a *Qui Tam* FCA Case Sixty Days to Appeal.

In the event that this Court determines the United States is not a party in declined *qui tam* FCA actions for purposes of Rule 4(a)(1)(B), and therefore adopts the shorter 30 day period for noticing appeals, it should not apply the new rule to the case of *Eisenstein*; instead it should announce the rule and prescribe it prospectively only. Application to the case at bar would require retroactive application to all pending cases. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (when a court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law, and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule"). That would include cases pending in the Third, Fifth, Seventh and Ninth Circuits, where litigants have been following established circuit law permitting appeals in *qui tam* actions up to 60 days.

Retroactive application of a shortened appeal time period would upend settled expectations and unfairly deprive *amici* relators of their chance to have the merits of their case heard by the Ninth Circuit on appeal. *Amici* were following controlling Circuit law in believing they had 60 days to notice their appeal. Any change to that rule resulting in a shortened appeal period should be applied prospectively only.

Prospective application for a rule shortening the time for noticing an appeal was the result in the Ninth Circuit decision remarkably on point. *See George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997) (*en banc*).

> "Applying our decision retroactively would be contrary to fundamental principles of fairness and due process of law, and would call into question the very integrity of this court's processes. Announcing a rule that allows litigants a specific period of time within which to appeal and then several years later declaring that we've changed our minds and will not recognize appeals that were filed within the proscribed period would be carrying the 'gotcha' principle beyond all previous limits. It would also be wholly unprecedented. ...
>
> "Considerations of fairness that presumptively prohibit retroactive application of the law are essential 'in a free, dynamic society [where] creativity . . . is fostered by a rule of law that gives people confidence about the consequences

of their legal actions.' *Id.* For that reason, among others, courts are reluctant to "sweep away settled expectations suddenly . . . ." *Id.* It would be difficult to imagine a more compelling circumstance for abiding by established legal rules than is presented in the case before us - a case in which we are asked to hold that time limits established by court decisions construing the Federal Rules of Appellate Procedure may be shortened without prior notice to litigants, and that the new time limits may be applied retroactively to pending appeals that were timely filed under our court-announced rule. The consequence of such a holding would be that litigants who complied with our rules by timely filing their appeals in accordance with our instructions would lose their rights to appeal, thereby forfeiting whatever underlying interests may have been affected by adverse district court decisions. Moreover, we are asked to hold that we are compelled to reach that result - a result that would appear to be unconscionable to most reasoning persons whether learned in the law or not." *George v. Camacho*, 119 F.3d at 1396-97.

"Rules are intended to provide certainty and to guide parties' actions. Making a rule shortening time for filing retroactive is inconsistent with both of these

> objectives. The ordinary processes of the law and the interests of justice are far better served by requiring courts to determine by objective standards - by examining the nature of the rule itself - how the type of change their decision will work should be made: prospectively or retroactively. ...
>
> "To propound a rule that prescribes a period of time within which litigants are free to appeal, and then to determine subsequently that the rule is erroneous and dismiss appeals that complied with it when filed, would undermine confidence in the judicial system. Moreover, contrary to the very objectives of a fixed time period for filing, applying our changed rule retroactively would unsettle matters that had already been settled, cast into doubt the practice of relying on the court's construction of the federal rules, and penalize parties whose conduct faithfully conformed to our determinations." [*George v. Camacho*, 119 F.3d at 1404.]

Although Rule 4(a)(1) has been described as "mandatory and jurisdictional," *United States v. Sadler*, 480 F.3d 932 (9th Cir. 2007), prospective application of a change in the rule here would be entirely appropriate. This Court in *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981) stated that jurisdictional rulings must always be applied

retroactively. Unanimous opinions from this Court in recent years, however, have admonished against indiscriminate use of the word "jurisdiction" and the "erroneous jurisdictional conclusions"that flow therefrom. *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510 (2006); *Eberhart v. United States,* 546 U.S. 12, 17-18 (2005) (*per curiam*); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). *See Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 2369-70 (2007) (dissenting opinion).

The crux of the trigger for the jurisdictional label lies in the extent to which the procedural rule is a component of the statutory grant. *See Sadler*, 480 F.3d at 936 ("The distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules drawn by *Eberhart* and *Kontrick* turns largely on whether the timeliness requirement is or is not grounded in a statute"). Here, both Rule 4(a)(1)(B) and the statute – 28 U.S.C. §2107(b) – confer subject matter jurisdiction to hear appeals that are filed within 60 days of final judgment when the government is a party.[3] Federal courts clearly possess the

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[3]Rule 4(a)(5) and 28 U.S.C. §2107(c) also confer jurisdiction (in the sense of the power to *hear* the matter) in cases noticed for appeal within 30 days after the running of the initial appeal period, where good cause or excusable neglect exists. Understanding the government to be a party for purposes of Rule 4(a)(1)(B) in a *qui tam* action would constitute such "good cause." That is particularly true in *Haight*, as *amici*'s understanding was based on settled circuit law. *See George*, 119 F.3d at 1410 (dissenting opinion) (party relying on overturned prior Circuit decision

(continued...)

authority to determine whether the government is or is not a party under both the rule and the statute. Any change in the governing interpretation of that aspect of the procedural rule cannot be mantled with authority of the original statutory grant. Instead, changing interpretations of both the rule and the statute can be subject to retroactivity analysis set forth in *George*.

Bowles v. Russell, 551 U.S. 205, 127 S.Ct. 2360 (2007) does not require a different conclusion. That case involved reliance on a district court's erroneous grant of 17 days to file an appeal reopened for lack of notice pursuant to Rule 4(a)(5) and 28 U.S.C. §2107(c). There, both the rule and statute permit a reopening of only 14 days. In contrast, here, there was no attempt to waive or correct omission of a clear statutory requirement. Moreover, while any litigant realizes that a district court's order might be subject to reversal on appeal, litigants – especially those in the Third, Fifth, Seventh and Ninth Circuits – relied on settled circuit law when they filed their appeals within 60

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[3](...continued)
would be "entitled to file her notice of appeal under a theory of excusable neglect; what, after all, could be more excusable than relying on a clear pronouncement of the court of appeals?"). In light of the jurisdictional power afforded by §2107(c), federal courts have jurisdiction over appeals in *qui tam* FCA cases filed within 60 days of final judgment even if the 30-day rule of §2107(a) applies, so long as reliance on settled law or reasonable interpretation of the *qui tam* FCA statute affords the basis for finding good cause and excusable neglect.

days. With the case in *Haight*, *amici* had relied on Ninth Circuit precedent already a decade old. That is not the type of settled expectations that can be fairly reworked after-the-fact resulting in the denial of the parties' day in court.

CONCLUSION

For the foregoing reasons, *Haight amici* urge the Court to reverse the Second Circuit Court of Appeals, and adopt the 60 day rule for noticing appeals in declined *qui tam* cases. In the alternative, should the Court choose to overturn the Third, Fifth, Seventh and Ninth Circuits on their interpretation of Rule 4(a)(1)(B), *Haight amici* ask the Court to make its ruling prospective only.

Respectfully submitted,

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